United Refining Company *and* International Union of Operating Engineers, Local 95, 95A, AFL–CIO.
Case 6–CA–29859

February 26, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 10, 1998, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in response to the Respondent's exceptions.

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judges rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Refining Company, Warren, Pennsylvania, its officers agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph l(b) and reletter the subsequent paragraphs.

"(b) Refusing to bargain in good faith with the Union over the terms and conditions of employment of the warehouse employees."

2. Substitute the following for paragraph 2(a).

"(a) On request of the Union, restore the terms and conditions of employment of the warehouse employees in effect before June 12, 1998, including their hourly wages, health plan enrollment, time and attendance procedure, cafeteria privileges, seniority dates, sick leave privileges, and vacation pay rates."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally, or for discriminatory reasons, change the terms and conditions of employment of the warehouse employees.

WE WILL NOT refuse to bargain in good faith with the Union over the terms and conditions of employment of the warehouse employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, restore the terms and conditions of employment of the warehouse employees in effect before June 12, 1998, including their hourly wages, health plan enrollment, time and attendance procedure, cafeteria privileges, seniority dates, sick leave privileges, and vacation pay rates.

WE WILL make the warehouse employees whole, with interest, for any loss of earnings or benefits caused by the June 12, 1998 changes.

WE WILL bargain in good faith with the International Union of Operating Engineers, Local 95, 95A, AFL-CIO,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding, inter alia, that the Respondent violated Sec. 8(a)(3) of the Act by requiring the warehouse employees to start punching a timeclock. We do not, however, adopt the judge's finding that by this conduct the Respondent also violated Sec. 8(a)(5) of the Act. See *Rust Craft Broadcasting of New York,* 225 NLRB 327 (1976).

Member Fox would adopt the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by requiring the warehouse employees to start punching a timeclock. She notes that the Respondent at no time contended that this was not a material change, let alone relied on *Rust Craft*. Rather, the Respondent's defense to this conduct, as well as all the unilateral changes, is that it had the right to put the warehouse employees under the contract that covered the other unit employees. Because, as the judge correctly found, the Respondent was not privileged to apply the contract to the warehouse employees, she would adopt the judge's finding that the change in the timeclock requirement violated Sec. 8(a)(5).

In its cross-exceptions, the General Counsel asserts that the judge inadvertently failed to find unlawful the Respondent's unilateral change in the vacation rate of pay of the warehouse employees. We agree with the General Counsel that this was an inadvertent error by the judge, and accordingly shall modify the judge's recommended Order and notice to include this unilateral change as part of the conduct violating Sec. 8(a)(5), (3), and (1) of the Act.

[2] In accordance with the General Counsel's cross-exceptions, we shall modify the judge's recommended Order to delete the phrase "any further" from the requirement that the Respondent cease and desist from changing the terms and conditions of employment of the warehouse employees, and we shall modify the notice to employees to include the payment of interest in the "make whole" portion of the notice. We shall also modify the judge's recommended Order and notice to include the requirement that the Respondent cease and desist from refusing to bargain with the Union over the terms and conditions of employment of the warehouse employees.

In our Order we provide that the Respondent shall restore the terms and conditions of employment of the warehouse employees in effect before June 12, 1998. Nothing in our Order, however, should be construed as requiring the Respondent to rescind, without a request from the Union, any increase in earnings and benefits that may have resulted from its unilateral changes. *Vibra-Screw, Inc.*, 301 NLRB 371 fn. 2 (1991).

over the terms and conditions of employment of the warehouse employees.

UNITED REFINING COMPANY

Dalia Belinkoff, Esq., for the General Counsel.
Richard W. Perhacs, Esq. (Knox McLaughlin Gornall & Sennett, P.C.), of Erie, Pennsylvania, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. The Respondent, United Refining Company, and the Union, the International Union of Operating Engineers, Local 95, 95A, AFL–CIO, have had a long-term collective-bargaining relationship. In February 1998, a majority of the Respondent's six warehouse employees voted to join the Union, with unexpected results: a degradation of the terms and conditions of their employment, as the Respondent proceeded to classify them as new entrylevel employees. This prompted the Acting General Counsel[1] to issue a complaint on July 9, 1998, alleging that the Respondent violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act. The Respondent denied the complaint's substantive allegations on July 15, 1998.

In a short trial held in Warren, Pennsylvania, on August 19, 1998, the Acting General Counsel called four witnesses and the Respondent called two witnesses. Both parties then filed briefs on October 9, 1998.[2]

II. FINDINGS OF FACT

The Respondent operates an oil refinery on the Allegheny River at Warren, Pennsylvania, from which it sells and ships over $50,000 of product to out-of-state locations annually (GC Exhs. 2–3). Of 300 or so total employees, 205 are unionized. Those not unionized include secretaries, certain engineers, mill room workers, and service station operators (Tr. 30–31). Before 1998, the employees at the warehouse were not unionized. Their job was to maintain and distribute parts to the refinery's other workers. The Union felt that these employees should become part of the main bargaining unit and, accordingly, a representation petition was filed on February 5, 1998. And on May 5, 1998, an election was held, which the Union won, 4–2; the results of which were certified on May 15, 1998 (GC Exhs. 3–5; Tr. 31–34).

One of the six warehouse workers left his job shortly after the election. Of the five remaining employees, they earned the following hourly and vacation pay before the election:

Paul Brink	$13.05 an hour
Henry Peano	9.88 an hour
Bryan Johnson Jr.	8.70 an hour
Tina Leonard	8.48 an hour
Sue Rugar	6.50 an hour

All these employees, except Tina Leonard, were enrolled in a Select Blue health plan before the election, which was an "HMO" plan not available to bargaining unit employees. Also before May 1998, these employees, other than Brink, kept track of their time and attendance by manually filling out timecards. They also were allowed to eat a $1 lunch in the company cafeteria, except for Brink. They also had various seniority dates ranging from 1975 to 1991 (Tr. 13–15, 76–77). During the election campaign, some of the warehouse employees were concerned about losing some of the aforementioned benefits if they joined the bargaining unit. Chief Steward Glenn Landers told them that it was a possibility (Tr. 85). And during the hearing held to determine whether the warehouse employees should be included in the bargaining unit, the Union believed that those employees should be covered by the existing collective-bargaining agreement (Tr. 65–66), which ran from February 1, 1996, to February 1, 2001 (GC Exh. 6).

After the election, the Union's business agent, James Carpenter, asked the Respondent to bargain over the terms and conditions of the employment of these warehouse employees. Carpenter felt that bargaining was required because these employees were new to the bargaining unit. So, Carpenter and Landers met with Lawrence Loughlin, the Respondent's personnel supervisor, on June 10, 1998. Landers thought this meeting would lay the groundwork for future bargaining negotiations. Carpenter asked where the warehouse workers would be placed in the Company's organizational scheme, and Loughlin responded that they would be classified as "laborers," or entrylevel employees earning $6.50 per hour. Loughlin added that their seniority would be calculated as of May 15, 1998, and that they would be taken out of the Select Blue health plan (Tr. 34-40, 70, 80). Loughlin added that the warehouse employees would receive the same benefits as bargaining unit employees—and nothing better—because "we already had a contract" (Tr. 45, 122). Also, they would have to pass a climbing test, which is required of all new employees. Further, they would have to punch a clock for time and attendance. And, as bargaining unit employees, they would no longer be allowed to eat in the company cafeteria (Tr. 118–121). Coming into the June 10 meeting, Carpenter felt that the warehouse employees should keep all their current benefits until negotiations were completed (Tr. 62). According to Carpenter, Loughlin said that he was "not going to give the Union anything that we can take to other non-union workers and show them what the Union could get for them." (Tr. 41). Also, according to Landers, Loughlin said that he was "not going to make it attractive for us to entice other employees to join the Union" (Tr. 74–75). But Loughlin denied saying that the Company was retaliating against the warehouse employees or trying to discourage future union organizing. But he conceded saying that "the Company did not know who else the Union was trying to organize in the future." (Tr. 128–129). So, Carpenter never got a chance to bargain over the warehouse employees' terms and conditions of employment. Moreover, there were no other meetings held for that purpose despite the Union's July 10, 1998 written request (GC Exh. 11; Tr. 46–48, 79).

On June 12, 1998, the Respondent changed the pay of the warehouse employees to $6.50 per hour, effective June 15 (GC Exhs. 7–8). Further, they were transferred (except for Leonard) to another health plan, had to start punching the timeclock (except for Brink), could no longer eat lunch in the cafeteria (except for Brink), had to take climbing tests (except for Brink),

[1] The General Counsel was in an acting capacity when the complaint was issued. But the adjective disappeared on October 22, 1998.

[2] On August 18, 1998, the Acting General Counsel filed for injunctive relief with the United States District Court. Oral argument was held on September 15, but the Respondent's request for oral testimony was denied because it was concluded that such would have been "duplicative of the recorded testimony presented to the ALJ." On October 30, the district court granted injunctive relief.

had their sick leave privileges eliminated, and were assigned plant seniority dates of May 15, 1998 (Tr. 13–15).

On five prior occasions, nonbargaining unit employees switched to new bargaining unit jobs, with no objections from the Union (Tr. 123–125). But the warehouse employees' situation was the first time that existing employees' *jobs* were transferred into the bargaining unit (Tr. 131–132). And Landers, who negotiated the 1996 contract, had no understanding then what would happen if existing jobs were transferred into the bargaining unit (Tr. 84–85). Indeed, the contract was silent on this.

On June 18, 1998, the Union filed a grievance, claiming that "the company illegally made a unilateral change in wages and benefits of the warehouse employees" (GC Exh. 13). The Union also filed other grievances regarding specific incidents in the warehouse on June 22, and 24 and July 6. But these grievances were withdrawn shortly thereafter because, according to Carpenter, there was nothing to file a grievance over if the Respondent refused to bargain (GC Exh. 12; Tr. 57).

Sometime in July 1998, Assistant Chief Steward Randy Hart asked Supervisor Charlie Morrison for a contribution to a fund for the warehouse employees. According to Hart, Morrison said that he would contribute because "it was a bunch of bullshit what the Company did." Morrison added that he "felt the company was watching us" and if the Union won this battle, the Union would try to organize other workers too (Tr. 89–91).

Bryan Johnson, one of the five remaining warehouse workers, testified that Warehouse Supervisor Kris Lord said that he "thought the Company was doing this to get even with us for joining the Union" (Tr. 95–96). Johnson understood this to be Lord's personal opinion (Tr. 102). But Lord denied telling Johnson that the Company was reducing their pay to retaliate for their vote for the Union (Tr. 112–113).

III. ANALYSIS

It is very well-settled that unrepresented employees who vote to join an existing bargaining unit "are not automatically swept under the terms of the agreement covering the existing unit. . . . Rather, the union and the employer bargain over the terms and conditions under which the [new] group will work until the contract in the larger unit expires, and the status quo from which they bargain is the current working conditions of those employees." *Borden, Inc.*, 308 NLRB 113, 114 (1992). Thus, the Respondent is clearly incorrect in contending that no additional bargaining was required for the five warehouse employees following the May 15, 1998 certification of the election. First, the Respondent cites to no relevant portion of the existing 1996 collective-bargaining agreement which addresses the central issue of this case: what happens when nonbargaining unit jobs are transferred into the bargaining unit. Indeed, because the 1996 agreement does not address this matter, bargaining over the status of the warehouse employees was all the more necessary. Second, the Respondent incorrectly reads the Union's filing of grievances in June and July 1998 as an implicit acceptance that all of the terms of the collective-bargaining agreement applied to the warehouse employees. Suffice it to say that the offer of water to a thirsty man does not mean the thirsty man endorses the flavor of the drink. Third, the June 10, 1998 meeting between the Union and management did not constitute anything approaching good-faith bargaining. Rather, Lawrence Loughlin simply stated that the five warehouse employees would be treated as new employees with a corresponding loss in wages and other benefits. And despite the Union's request, no other "bargaining" session was ever held. Nor was any genuine impasse reached between the Union and the Respondent. Thus, the Respondent's June 12, 1998 unilateral changes in the five warehouse employees' terms and conditions of employment violated Section 8(a)(1) and (5). Accordingly, the Respondent will be ordered to return the five employees to the status quo as of June 12, 1998, and to bargain in good faith with the Union over how these employees fit in to the bargaining unit before the expiration of the collective-bargaining agreement on February 1, 2001.

Turning to the General Counsel's theory that the Respondent's refusal to bargain was founded in union animus, as opposed to a good-faith legal position, there are five pieces of evidence. First, the General Counsel cites Carpenter's testimony that Loughlin stated in the June 10 meeting that he was "not going to give the Union anything that we can take to other non-union workers and show them what the Union could get for them." Second, Union Steward Landers testified that Laughlin stated in the same meeting that management was "not going to make it attractive" for the Union to organize other workers. Third, the General Counsel points to Laughlin's version of the same meeting, in which he admitted saying that the Respondent would not negotiate because "the Company did not know who else the Union was going to try to organize in the future." Fourth, in July 1998 another supervisor, Charlie Morrison, said that what the Respondent did was "bullshit" and that he "felt" the Respondent was "watching" the Union. Fifth, there is the allegation that another supervisor, Kris Lord, said that "the Company was doing this to get even" with the Union; a statement denied by Lord. Likewise, Laughlin denied the statements attributed to him by Carpenter and Landers.

The question is whether any of the Respondent's supervisors said anything incriminating about the Company's motives for failing to negotiate. In the presiding judge's view, the alleged remark by Morrison was peripheral and ambiguous. As for Lord's alleged remark, it is troubling that warehouse employee Johnson, who allegedly was on the receiving end of Lord's remark, failed to mention this in his pretrial affidavit. In any event, neither Morrison nor Lord played any apparent part in the Respondent's decision not to negotiate with the Union. But Laughlin, of course, was the key player in that decision and his direct trial testimony clearly links this strategy with the Union's right to engage in future organizing. On top of that, Carpenter and Landers both credibly testified about antiunion remarks made by Laughlin in the June 10 meeting. On balance, therefore, the General Counsel has met its burden of showing that the Union's protected activity was a motivating reason for the Respondent's refusal to bargain with, and decision to impose unilaterally the June 12, 1998 conditions of employment upon, the warehouse employees. Further, the Respondent has failed to establish, by a preponderance of the evidence, that its decisions were based on lawful reasons and would have occurred even if it harbored no union animus. Indeed, as already discussed, the Respondent's failure to bargain was clearly unlawful under established Board precedent. Therefore, it is concluded that the General Counsel has proven that the Respondent also violated Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp*., 462 U.S. 393 (1983).

CONCLUSIONS OF LAW

1. The Respondent, United Refining Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local 95, 95A, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove its allegations at paragraphs 13, 15(b), and 26 of the August 17, 1998 amended complaint.

4. Pursuant to paragraphs 14, 15, 16, 17(a), 17(c), 18, 19, 20, 21, and 27 of the amended complaint, the Respondent violated Section 8(a)(1) and (3) of the Act by changing the terms and conditions of employment of the warehouse employees in order to discourage membership in a labor organization.

5. Pursuant to paragraphs 23, 24, 25, and 28 of the amended complaint, the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally imposing terms and conditions of employment on the warehouse employees, and refusing to bargain collectively with the Union.

6. The Respondent's unfair labor practices, described in paragraphs 4 and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, United Refining Company, Warren, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, or for discriminatory reasons, changing any further the terms and conditions of employment of the warehouse employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the terms and conditions of employment of the warehouse employees in effect before June 12, 1998, including their hourly wages, health plan enrollment, time and attendance procedure, cafeteria privileges, seniority dates, and sick leave privileges.

(b) Make the warehouse employees whole for any loss of earnings and other benefits caused by the June 12, 1998 changes, to be computed as set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Bargain in good faith with the Union over the terms and conditions of employment of the warehouse employees.

(d) Preserve and make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Warren, Pennsylvania office copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's unopposed October 8, 1998 motion to correct the transcript is granted.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."